



REPUBLIC OF KENYA



**Rua v Republic (Criminal Appeal 9 of 2020)  
[2022] KECA 1162 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1162 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 9 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**JACKSON JUMA RUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Malindi  
(Meoli, J.) dated 13th February 2015 and delivered by Chitembwe,  
J. on 4th March 2015 in High Court Criminal Case No. 29 of 2013)*

**JUDGMENT**

1. In this appeal, the appellant Jackson Juma Rua, is challenging the judgment of the High Court at Malindi (Meoli, J.) dated February 13, 2015 and delivered by Chitembwe, J. on 4<sup>th</sup> March 2015 in which the appellant was convicted for the offence of murder and sentenced to imprisonment for a term of 25 years.
2. In his grounds of appeal, the appellant contends that the conviction and sentence are erroneous because the prosecution case was riddled with contradictions; that his identification was mistaken; that the charge of murder was not established; and that he was not subjected to mitigation in contravention of Articles 25(c) and 50(2) of *the Constitution* of Kenya.
3. Based on the Information dated November 29, 2013 placed before the High Court Malindi, the appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on November 13, 2013 at Indian Ocean Dabaso Sita area of Gede Location within Kilifi County the appellant murdered Samuel Richard Chengo (the deceased).
4. The evidence of Brian Katana (PW1), Martin Justus (PW2), Ferdinand Kahindi (PW3) and Tydyson Justus (PW5), all minors aged 9, 12, 12, and 13 years respectively and residents of Dabaso, was that on



13<sup>th</sup> November 2013 at about 2.00 p.m., together with the deceased, they were at Dabaso Sita beach where they had gone fishing; that after catching about 25 fish they decided to go home when they encountered the appellant who demanded the fish; that when they resisted, the appellant, armed with a knife and oar, threatened to harm them and ordered them to lie down in the water with their faces down; that as they did so, the appellant poked their backs with the oar; that the deceased managed to break free and in a bid to escape ran towards the deep waters. In the words of PW2:

“It was about 2.00 pm. We got some fish and each of us carried some as we went home. Juma Ruwa appeared and demanded we give him fish. We refused. He pulled out a knife and had an oar. He ordered us to lie down in the water. He poked us with the oar. Samuel fell down and fled to deep waters and drowned. We told the accused Samuel would drown when we saw him runs (sic) off. Accused dismissed us. We screamed and people came and pursued Samuel. He was already dead but the man who stopped us fled. He got into a small boat and fled.”

5. PW 3’s testimony was to the same effect as follows:

“We were fishing. It was 2 pm. When we finished we started to go home cutting our fish. We met a man called Juma Ruwa who demanded we give him the fish. We refused. Ruwa said he would stab us with the knife which he produced if we did not give up the fish. He orders(sic) us to lie in the water. We did. He poked us hard with the stick. One of us Samuel took a lot of water and tried to run into deep waters. Samuel had been with us. Samuel ran into deep waters in a bid to escape. He drowned and we screamed. People came to the scene.”

6. It was their testimony that PW1 also took in a lot of water as a result. Kitsao Salim (PW7), a guard in a hotel in Watamu, tried to help in removing water taken in by PW1 before being taken to Gede Hospital.

7. Richard Chengo ((PW4), the father of the deceased was at home with his brother Leonard on 13<sup>th</sup> November 2013 at 2.00 p.m. when he got information that his son, the deceased, who had gone fishing with other neighbours “had been killed in the water”; that he was too anxious to walk and his brother went to inquire and called back to inform him that the deceased had been pulled out of the water and taken to hospital; that he then went to the hospital from where the body of the deceased was taken by the police.

8. Anton Fondo Kalama (PW6) a resident of Sita Dabaso had left his home and was on his way to work on 13<sup>th</sup> November 2013 when he heard cries that some children were drowning; he ran and got a canoe and proceeded to the scene where he met one Jackson and together, they pulled the canoe into the water paddled to the scene of drowning as pointed out to them where they reached the body of a male child and pulled it out.

9. Based on a Post mortem report which was produced before the trial court by Dr. Salma Mansur (PW9) on behalf of Dr. F. Mapenzi, a medical officer at Malindi Hospital who performed the post mortem, it was opined that the cause of death of the deceased was cardio respiratory arrest as a result of drowning.

10. Police Constable Onesmus Mutua (PW8) testified on the arrest and subsequent arraignment of the appellant on the charge of murder.

11. In his defence, the appellant stated that he is a fisherman and a resident of Sita Dabaso and that on 13<sup>th</sup> November 2013 he was at sea and decided to go to the shore to fill his container with water from a tap; that there were children swimming in the water and their clothes were on the beach; that water was



- rising and he took a canoe back to island leaving the children in the water swimming; that later at 6.00 p.m. a boat came with people and it was said that some children had drowned at the ocean and that he was involved in the drowning incident; that he said that he had seen the children swimming but did not engage with them at all and that later the police came and arrested him.
12. Satisfied that the prosecution had proved its case, the High Court, in the impugned judgment, convicted the appellant for murder and thereafter sentenced him to serve 25 years imprisonment.
  13. Urging the appeal before us, Mr. Geoffrey Were, learned counsel for the appellant relied on his written submissions as well as the appellant's own written submissions. According to the appellant, the evidence on the basis of which he was convicted was substantially circumstantial and it did not meet the threshold as set out in *Republic vs. Kipkering Arap Koskei* [1949] EACA 135; that in any event there was no evidence of malice aforethought; and that the sentence meted out is manifestly harsh and excessive.
  14. Counsel for the appellant submitted that there were serious inconsistencies, variances and contradictions in the testimonies of PW1, PW2, PW3, and PW8 which the trial court failed to consider; that the trial Judge failed to consider that mens rea was not established as the action by the deceased to run into deep waters was a miscalculation on his part and the appellant had no prior intention to murder the child. At worst, the conviction for murder should be set aside and substituted with manslaughter, counsel urged.
  15. Opposing the appeal, learned counsel Mr. Kennedy Kirui Kariuki for the respondent submitted that all the ingredients of the charge of murder, namely the death of the deceased; that the appellant committed an unlawful act which caused the death of the deceased; and that the appellant had malice aforethought were established. It was submitted that it is not in any doubt, based on the postmortem report produced by PW9, that the deceased died as a result of cardio respiratory arrest as a result of drowning.
  16. As to whether the appellant committed the unlawful act which caused the death, it was submitted that the evidence of PW1, PW2, PW3 and PW5 was consistent in the description of the events of the fateful afternoon; and that the appellant who was well known to the witnesses was positively identified.
  17. As to whether the accused had malice aforethought, counsel submitted that evidence was led that the appellant was armed with a knife and oar; that the appellant threatened the deceased and the other children with violence and the deceased died while escaping violence; that if it was not for the action of the appellant, death would not have occurred and the appellant is therefore guilty of murder in accordance with Section 213 of the *Penal Code*.
  18. Counsel referred to Section 206 of the *Penal Code* in urging that malice aforethought was established as the appellant knew or ought to have known that his action or omission by making the minors, including the deceased, to lie down in water while armed with a knife and oar would probably cause death or harm to the deceased. The case of *Republic vs. Redempta Nithenya Mwanzia* [2017] eKLR was cited in support for the argument that the requirement of mens rea under Section 206 is satisfied by showing of either reckless or intentional conduct on the part of the appellant.
  19. We have considered the appeal and the submissions. The main issue that arises for consideration is whether the offence of murder was proved to the required standard of beyond reasonable doubt. In that regard, it was incumbent upon the prosecution to establish the death of the deceased and the cause of that death; that the death was caused by an unlawful act committed by the appellant; and that the



appellant had malice aforethought. As stated by this Court in *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;
- (b) that the accused committed the unlawful act which caused the death of the deceased and
- (c) that the Accused had the malice aforethought.”

20. The fact that the minor, Samuel Richard Chengo, died at Indian Ocean, Dabaso Sita area of Gede Location within Kilifi County as a result of drowning on November 13, 2013 is not contested. In that regard there is the unchallenged testimony of PW4 the father of the deceased; the testimonies of PW6 and 7 who assisted in the retrieval of the deceased’s body from the ocean; and the post mortem report of Dr. Mapenzi produced by PW9 based on which it was found that the cause of death of the deceased was cardio-respiratory arrest as a result of drowning.

21. As to whether that the appellant committed an unlawful act that caused the death, there is, for a start, the question of his identification. PW1 was clear in his testimony that the person who demanded their fish catch of the day and ordered them to lie down in the water while poking them with his oar was the appellant. PW1 stated that:

“The accused is the man who attacked us. He is called Juma Ruwa. He used to come to our home and he would go round the village chanting “kula wire, kula wire” and children would follow him in the village.”

22. PW1 maintained that position under cross examination when he reiterated that “I knew the accused as Juma Ruwa.” PW2 was equally clear that it was the appellant who accosted them. In his words, “Juma Ruwa appeared and demanded we give him fish. We refused. He pulled out a knife and had an oar. He ordered us to lie down in the water.” PW3’s testimony was in the same vein that, “we met a man called Juma Ruwa who demanded we give him fish. We refused. Ruwa said he would stab us with the knife which he produced if we did not give up the fish. He orders us to lie in the water.” The testimony of PW5 was to the same effect. The appellant, though denying that he attacked the children, did not contest his presence at the scene.

23. Based on our review and evaluation of the evidence, we concur with the conclusion reached by learned trial judge that the testimony of PW1, PW2, PW3 and PW5 was consistent in the description of the events of the fateful afternoon that it was the appellant who accosted them demanding they hand over the fish they had caught and that when they declined to do so he forced them into the water and compelled them to lie in the water with their faces down while wielding a knife and oar and that the deceased drowned while trying to escape the appellant’s cruel treatment.

24. Section 213 of the *Penal Code* provides that a person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in the circumstances therein set out. Section 213 of the Penal Code provides in relevant part that:

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases -

- a. ...



- b. ...
- c. if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
- d. ...”

25. Based on the evidence, there can be no doubt that it is the action of the appellant, the violence he threatened to inflict on the minors with the knife and in ordering them to lie in the water and poking their backs with the oar that precipitated the drowning of the deceased which caused his death. We are satisfied, as was the trial court, that the death of the deceased was a direct result of the unlawful action on the part of the appellant.

26. Lastly, there is the question whether the appellant had malice aforethought. Under Section 206 (b) of the *Penal Code*, malice aforethought is deemed to be established by evidence proving knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused. As already indicated, the appellant, while armed with a knife and oar forced the minors, including the deceased, to lie down in the water with their faces down in the water. The deceased drowned and died in his bid to escape the appellant’s assault. Bearing in mind the conduct of the appellant; the fact that he was wielding a knife; and used the oar to poke the backs of the minors to keep them in the water, the appellant must have known or ought to have known that his actions would probably lead to the drowning and death of the minors. In our view malice aforethought necessary to constitute murder was in our view established within the meaning of Section 206 of the *Penal Code*.

27. As for the sentence, the learned Judge considered the mitigation that the appellant is married with five children and the sole breadwinner and that he was repentant and a first offender and that despite the fact that death sentence was prescribed as punishment for murder under Section 204, the court in exercise of discretion sentence the appellant to serve 25 years imprisonment. We have no basis for interfering with that sentence.

28. All in all, the appeal fails and is hereby dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF OCTOBER 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*



*Signed*

**DEPUTY REGISTRAR**

